STATE OF MICHIGAN

IN THE SUPREME COURT

AMELIA HOSEY,

Plaintiff-Appellee,

V

CHANTAY STARGHILL BERRY

Defendant-Appellant.

S.C. No. 131213
COA No. 257709
L.C. No. 03-050311-NI

/

MICHIGAN DEFENSE TRIAL COUNSEL'S AMICUS BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

131213

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STATEMENT OF THE QUESTION PRESENTED

DOES MCR 2.116(G)(6) PERMIT A TRIAL COURT, IN DECIDING A MOTION FOR SUMMARY DISPOSITION, TO CONSIDER UNSWORN STATEMENTS OR OPINIONS OF POTENTIAL WITNESSES CONTAINED IN DOCUMENTS THAT MAY BE INADMISSIBLE AT TRIAL?

Plaintiff-appellee answers "Yes."

Defendant-appellant answers "No."

The trial court would presumably answer "No."

The Court of Appeals answered "Yes."

Amicus Curiae Michigan Defense Trial Counsel answers "No."

ORDERS APPEALED FROM AND RELIEF SOUGHT

Amicus curiae Michigan Defense Trial Counsel ("MDTC") files this brief in support of defendant-appellant's application for leave to appeal from the Court of Appeals opinion, *Hosey v Berry,* unpublished opinion per curiam issued April 6, 2006 (Docket No. 257709) (attached as Exhibit A to Defendant-Appellant Berry's Application For Leave To Appeal).

MDTC urges this Court to peremptorily reverse the Court of Appeals or, failing that, grant the application for leave to appeal, and correct the Court of Appeals errant opinion that allows a trial court to consider inadmissible, hearsay statements in response to a motion for summary disposition under MCR 2.116(C)(10), in light of this Court's clear pronouncement to the contrary. Absent the Court's decision to peremptorily reverse, or hear and decide this case, the Court of Appeals opinion concerning what evidence a trial court may consider when reviewing a motion for summary disposition under MCR 2.116(C)(10) will lack consistency. An errant Court of Appeals opinion that allows a trial court to consider inadmissible, hearsay statements in response to a motion for summary disposition under MCR 2.116(C)(10), in light of this Court's clear pronouncement to the contrary, must be reversed or, failing that, subject to careful and thoughtful review. This Court has a duty to give guidance to trial courts concerning the proper interpretation and application of the rules governing summary disposition. Otherwise, the litigants will lose their ability to rely on a consistent application of the rule of law with respect to evidence properly submitted to rebut summary disposition. Such inconsistency detracts from the governing rules and the predictability of the outcome. Unless this Court intervenes, litigants will lose faith in their ability to proceed to trial in appropriate cases confident in the availability of appellate review to correct error. This Court must make the parameters of summary disposition under MCR 2.116(C)(10) clear and provide a model for careful appellate review as to applying these rules where the Court of Appeals has ignored these parameters.

STATEMENT OF FACTS

Amicus curiae MDTC adopts the statement of facts and proceedings set forth in defendant-appellant Chantay Starghill Berry's application for leave to appeal.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Cameron v Auto Club Ins Ass'n,* 476 Mich 55, 60; 718 NW2d 784 (2006). This case also presents a question of law, the proper interpretation of the court rules governing summary disposition, which this Court reviews de novo. *CAM Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

ARGUMENT

MCR 2.116(G)(6) DOES NOT PERMIT A TRIAL COURT, IN DECIDING A MOTION FOR SUMMARY DISPOSITION, TO CONSIDER UNSWORN STATEMENTS OR OPINIONS OF POTENTIAL WITNESSES CONTAINED IN DOCUMENTS THAT MAY BE INADMISSIBLE AT TRIAL.

The evidence that plaintiff submitted to rebut defendant's motion for summary disposition under MCR 2.116(C)(10) were three treating physician reports on which the physicians checked "yes" next to the pre-printed question, "Are symptoms and diagnosis a result of the accident?". (See Exhibits B – D to Defendant-Appellant's Application For Leave To Appeal). As the Court of Appeals pointed out, the reports themselves were inadmissible, hearsay evidence. However, the Court of Appeals concluded that the trial court should have considered the unsworn statements contained within the reports in deciding defendant's motion for summary disposition under MCR 2.116(G)(6). Amicus curiae MDTC asserts that MCR 2.116(G)(6) does not allow a trial court to consider unsworn statements or opinions of potential witnesses contained in documents that may be inadmissible at trial.

This Court applies the rules of statutory interpretation to the interpretation of a court rule. *Haliw v Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005). The goal of statutory construction is to give effect to the drafter's intent by examining the rule's language. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). Where the rule's language is unambiguous, appellate courts presume that the drafter intended the rule's plain meaning and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000).

Defendant sought summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the complaint's factual sufficiency. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings,

depositions, admissions, and documentary evidence filed or submitted in the action in the light most favorable to the opposing party. MCR 2.116(G)(6) allows the trial court consider these items only to the extent that their "content or substance would be admissible as evidence" to show or deny the grounds stated in the motion:

> Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion. [MCR 2.116(G)(6).]

The key language from MCR 2.116(G)(6), for purposes of this case, is "the content or substance would be admissible as evidence." The drafter's use of this language evidences its intent that the trial court only consider the "content or substance" of the proffered evidence if it "would be admissible" at trial.

Here, the "content or substance" of plaintiff's proffered physician reports was three unsworn statements by plaintiff's treating physicians that plaintiff had lower back disc degeneration that was related to an auto accident. The trial court cannot consider these unsworn, out of court statements under MCR 2.116(G)(6) because the statements themselves, even if "pulled out" of the report, would *not* be not admissible at trial. MRE 803. Plaintiff would need to take another step to get the actual statements themselves admitted at trial – plaintiff would need to get sworn statements, i.e., deposition testimony or an affidavit, from these three physicians. Speculating that plaintiff would take this extra step to turn this content into admissible evidence is directly contrary to this Court's pronouncement in *Maiden v Rozwood,* 461 Mich 109, 121; 597 NW2d 817 (2000), that it is insufficient for a party opposing a motion for summary disposition to cite a mere possibility or promise of admissible, supporting evidence at trial. The focus is instead upon the admissibility of the evidence that the opposing party actually proffered at the time of the hearing:

> A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.
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> * * *
>
> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [*Maiden* at 121.]

The content of the reports that plaintiff actually proffered at the time of the hearing was unsworn, out of court, conclusory physician opinions that were based on plaintiff's description of the events. If these opinions, as actually proffered at the time of the hearing, were presented at trial, they would not be admissible as they are unsworn, out of court, hearsay statements. MRE 803. The Court of Appeals conclusion otherwise is wrongly contingent on plaintiff taking the needed step to make these opinions admissible, i.e., get sworn, factually supported opinions, as it violates this Court's pronouncement that such "mere possibilities" or "promises" of supporting, admissible evidence are insufficient under the court rules. *Maiden* at 121. This Court should, therefore peremptorily reverse or, failing that, grant leave to appeal.

The Court of Appeals' erroneous conclusion that the trial court may consider the content of inadmissible reports when deciding a motion for summary disposition where that content is inadmissible, unsworn statements or opinions is not only legally wrong but is harmful to important policy considerations surrounding the judicial process. The theme of this Court's recent jurisprudence was "integrity" in the judicial process. This Court mandated "integrity" in the legal process by commanding respect from practitioners and judicial officers. See, e.g., *Grievance Administrator v Fieger,* 476 Mich 231; 719 NW2d 123 (2006); *In re Haley*, 476 Mich 180; 720 NW2d 246 (2006) (a judge's acceptance of football tickets while on the bench

"jeopardized public confidence in the integrity and impartiality of the judiciary"); *Maldonado v Ford*, 476 Mich 372; 719 NW2d 809 (2006) (the trial court's authority to dismiss a lawsuit for litigant misconduct is root in a court's fundamental interest in protecting the integrity of the judicial process).

This Court's charge to preserve the "integrity" of the judicial process extends to mandating that evidence be reliable. This is best illustrated by this Court's clarification of the trial court's role in ensuring expert opinion reliability and admissibility under MRE 702. In *Gilbert v DaimlerChrysler,* 470 Mich 749; 685 NW2d 391 (2004), this Court defined the trial court's duty under MRE 702 to ensure that all expert opinion testimony is reliable.

> [T]he court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just "general acceptance" in determining whether expert testimony must be excluded. [*Gilbert* at 782].

The *Gilbert* Court also expressed that a trial court should be careful with its gatekeeping role when dealing with expert's providing causation testimony where the opinion is based only on the expert's own beliefs rather than any other basis.

> Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation. The United States Supreme Court's caveat in *Joiner* is persuasive:
>
> ["]Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.["] [*Id.* at 783.]

According to this precedent, the trial court's gatekeeping role under MRE 702 "requires the trial court to ensure that each aspect of an expert witness's proffered testimony – including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data – is reliable." *Gilbert* at 779. The trial court's gatekeeping duty to

screen expert testimony for reliability before it is admissible enhances the integrity of the fact-finding process by avoiding juror confusion and speculation. *Id.* See also *Woodward v Custer*, 476 Mich 545; 719 NW2d 842 (2006) (mandating experts in medical malpractice cases to have similar board certification and specialty under MCL 600.2169 protects the fact-finding process from irrelevant, confusing or speculative evidence).

Adopting the Court of Appeals' broad rule that under MCR 2.116(G)(6) a trial court may consider unsworn statements or opinions that are inherently unreliable and inadmissible in deciding a summary disposition motion would jettison well-established law governing the trial court's role in ensuring the reliability and admissibility of *all evidence,* including expert and lay witness opinions. In turn, it would jettison this Court's paramount goal of ensuring "integrity" in the judicial process.[1] This cannot stand.

Additionally, amicus curiae MDTC urges this Court to peremptorily reverse or grant leave to appeal from the Court of Appeals opinion because the Court of Appeals wrongly assumed that the trial court refused to consider the content of plaintiff's proffered physician reports as inadmissible hearsay. This is not true. The trial court *did* consider the content in plaintiff's proffered physician reports and found that the content was not enough to establish plaintiff's claim.

During the hearing on defendant's motion for summary disposition, the trial court expressly considered these reports, discussed their content, and concluded that they did not establish the necessary objective manifestation or casual connection between plaintiff's injuries

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[1] It also directly conflicts with current Court of Appeals published decisions. See, e.g., *SSC Associates v General Retirement System of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991) ("Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence."); *Marlo Beauty Supply, Inc v Farmer Ins Group*, 227 Mich App 309, 330; 575 NW2d 324 (1998) (trial court erred in relying on an unsworn opinion letter by an alleged handwriting expert in deciding summary disposition motion).

and the motor vehicle accident. (See Exhibit E to Defendant-Appellant Berry's Application For Leave To Appeal, Tr 6/23/04, p 11).

The trial court noted that Dr. Mendiratta's report stated, "The accident occurred in October of 2000" and that Dr. Powell's report stated, "Motor vehicle accident, October 7th, 2000. Developed severe low pain. Low back pain that is." (Tr 6/23/04, pp 11-12). The trial court found that this content was merely Dr. Mendiratta and Dr. Powell writing down plaintiff's description without providing the needed "additional, *objective* evidence" to create the necessary causal connection between the two.

> This Court is satisfied that merely writing down what the patient has described without providing any additional, objective evidence to show a connection between the condition and the accident is not sufficient to establish a direct relation between the two. [*Id.*, p 12.]

The trial court again looked to the content of the reports, labeled them "pre-printed, standardized forms," and found that checking "yes" on these pre-printed, standardized forms was insufficient to show an objective manifestation of plaintiff's impairment.

> In addition, this Court is satisfied that simply checking yes on a preprinted form is not conclusory and is not sufficient to establish an objective manifestation of Plaintiff's impairment. [*Id.*]

Because the trial court concluded that the *content of these reports* was not enough to show an objective manifestation of an injury nor any causal link between an objective manifestation of an injury and the car accident, the trial court dismissed plaintiff's claims under the no-fault act. (*Id.*, p 13).

The trial court did not, contrary to the Court of Appeals opinion, refuse to consider the proffered reports' content because the reports were inadmissible hearsay and insufficient to rebut defendant's motion for summary disposition. Instead, the trial court specifically analyzed the content in the reports, found that it was conclusory, as it simply reiterated plaintiff's own

description of events without more, and properly concluded that that did not support plaintiff's claims. See, e.g., *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). (conclusory allegations without detail are insufficient to create a genuine issue of material fact). As a result, the Court of Appeals opinion remanding to the trial court for it to repeat what it has already done – consider the content of the reports – is improper. The trial court, as evidenced by its reasoning, already did so and found that the content was legally insufficient to prove plaintiff's claim. The Court of Appeals opinion is silent as to whether the content of the reports is legally sufficient to support plaintiff's claims. Thus, regardless of whether the trial court erred by allegedly failing to consider (or erred by considering) the content of plaintiff's proffered physician reports, the result will be the same – summary disposition for defendant – because: (1) without the reports, there was nothing linking plaintiff's injury to the accident; and (2) with them, the trial court already ruled that the content of the reports showed neither objective manifestation nor a causal connection and the Court of Appeals did not address this ruling. Consequently, no matter how this Court decides the issue it has framed, the result in this specific case will be the same – summary disposition for defendant. Thus, a reversal is warranted. Failing that, this Court should grant leave to appeal.

CONCLUSION

Amicus curiae Michigan Defense Trial Counsel respectfully request that this Court peremptorily reverse the Court of Appeals opinion or grant defendant-appellant's application for leave to appeal.

Respectfully submitted,

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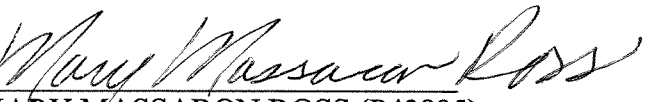
By: 

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